Supreme Court, U. S.
FILED
OCT 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS,
Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma

REPLY BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

GEORGE B. CHRISTENSEN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

JOSEPH FONTANA
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

BRUCE MILLER TOWNSEND
201 Denver Building
7th & Denver
Tulsa, Oklahoma 74119
Counsel for Appellants

Of Counsel:

WINSTON & STRAWN
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Suite 5000
One First National Plaza
Chicago, Illinois 60603

14841-10-76

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	14
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES:

Absentee Delaware Tribe of Oklahoma v. *United States*, 5 Ind. Cl. Comm'n 491-92 (1957) 8

Board of County Supervisors v. *Seber*, 318 U.S. 705 (1943) 10

Cherokee Freedmen v. *United States*, 195 Ct. Cl. 39 (1971) 10

Cherokee Nation v. *Journeycake*, 155 U.S. 196 (1894) . 8

Commercial Trust Co. of New Jersey v. *Miller*, 262 U.S. 51 (1923) 3

Delaware Indians v. *Cherokee Nation*, 193 U.S. 127 (1904) 8

Delaware Tribe of Indians v. *United States*, 128 F. Supp. 391 (Ct. Cl. 1955) 8

Delaware Tribe of Indians v. *United States*, 2 Ind. Cl. Comm'n 253 (1952) 8

Gilligan v. *Morgan*, 413 U.S. 1 (1973) 5

Holden v. *Joy*, 84 U.S. (17 Wall.) 211 (1872) 3

Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 3, 4, 13

Morton v. *Mancari*, 417 U.S. 535 (1974) 2, 3, 7, 10

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335 (1940) 3

Red Lake and Pembina Bands v. *Turtle Mountain Band of Chippewa Indians*, 355 F.2d 936 (Ct. Cl. 1965) 10

Sac and Fox Indians of the Mississippi in Iowa v. *Sac and Fox Indians of the Mississippi in Oklahoma*, 220 U.S. 481 (1911) 10

	Page
Sizemore v. *Brady*, 235 U.S. 441 (1914)	11
United States v. *First National Bank*, 234 U.S. 245 (1914)	4
United States v. *Forty-three Gallons of Whiskey*, 93 U.S. (3 Otto) 188 (1876)	3
United States v. *Holliday*, 70 U.S. (3 Wall.) 407 (1865)	4, 13
United States v. *Jim*, 409 U.S. 80 (1972)	11
United States v. *Sandoval*, 231 U.S. 28 (1913)	3, 10
United States ex rel. Standing Bear v. *Crook*, 25 Fed. Cas. No. 14,891 (C.C. Neb. 1879)	12
United States v. *State Tax Commission of Mississippi*, 535 F.2d 300 (5th Cir. 1976), *aff'g on rehearing*, 505 F.2d 633 (5th Cir. 1974)	6
United States v. *State Tax Commission of Mississippi*, 505 F.2d 633 (5th Cir. 1974), *aff'd on rehearing*, 535 F.2d 300 (5th Cir. 1976)	6

STATUTES AND TREATIES:

25 U.S.C. § 71 (1970)	3
25 U.S.C. § 1182 (1970)	8
25 U.S.C. § 1291 (Supp. IV, 1974)	8
25 U.S.C. § 1292(c) (Supp. IV, 1974)	8
25 U.S.C. § 1294(b) (Supp. IV, 1974)	8, 9
Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222	8
Act of Feb. 7, 1925, ch. 148, 43 Stat. 812	8
Treaty of July 8, 1817, 7 Stat. 156 (Cherokee)	12
Treaty of Feb. 27, 1819, 7 Stat. 195 (Cherokee)	12
Treaty of Sep. 5, 1820, 7 Stat. 210 (Choctaw)	12
Treaty of Sep. 27, 1830, 7 Stat. 333 (Choctaw)	12
Treaty of Oct. 20, 1832, 7 Stat. 381 (Chickasaw)	12
Treaty of Dec. 29, 1835, 7 Stat. 478 (Cherokee)	12
Treaty of May 6, 1854, 10 Stat. 1048 (Delaware)	7
Treaty of Feb. 5, 1856, 11 Stat. 663 (Stockbridge and Munsee)	12

	Page
Treaty of June 19, 1858, 12 Stat. 1037 (Sioux)	12
Treaty of Nov. 15, 1861, 12 Stat. 1191 (Potawatomi)	12
Treaty of June 28, 1862, 13 Stat. 623 (Kickapoo)	12
Treaty of July 4, 1866, 14 Stat. 793 (Delaware)	7
Treaty of Feb. 23, 1867, 15 Stat. 513 (Ottawa, others)	12
Treaty of Feb. 27, 1867, 15 Stat. 531 (Potawatomi)	12

MISCELLANEOUS:

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (U.N.Mex. ed. 1942)	3, 4
C. WESLAGER, THE DELAWARE INDIANS (Rutgers U. 1972)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS,
Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma

---

REPLY BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

ARGUMENT

The Court will receive scant assistance from the Brief for Appellee Weeks, for, in an amazing passage, the brief writer disavows any intention of responding to Appellant's principal arguments. Brief for Appellees, at 60-62. He asserts that the trial court did not hold what Appellants say it did. But that is mere brief writer's *fiat*.

For example, it is stated that the "District Court did not instruct Congress as to how it shall deal with Indian tribes"; therefore the brief writer elects not to face squarely the separation of powers issue.

However, it is plain that the decision lectures Congress (we paraphrase):

> If, in passing a statute for distribution of an Indian Claims Commission award for rectification of an ancient wrong to tribal property, you decide to make any *per capita* distribution, you must include therein all lineal descendants of the tribal members as of the date of the wrong, whether or not they are now members, or your statute will be unconstitutional.[1]

If that is not instruction to the political branches of Government, words have lost meaning.

The brief fails to meet the constitutional questions as to justiciability and rational classification on the facts as unanimously found below. It does not mention, much less attempt to explain or distinguish, *Morton v. Mancari,* 417 U.S. 535 (1974). It further proceeds upon the fallacious assumption that the Indian Claims Commission award was intended to redress representatives of "persons" who were wronged in 1854, whereas it is clear that the 1854 wrong was to tribal property held communally rather than individually. Brief for Appellees, at 43-44.

---

[1] We are aware of the internal inconsistency in the decision below that apparently finds no fault, *per se,* in the distribution of 10 percent of the award to the tribes for tribal purposes, but that nevertheless sweeps the 10 percent away on the theory that the provisions of the statute are not severable. Tacitly, at least, the majority seems to approve this provision. Yet it obviously violates the majority's mistaken concept of equal treatment, for, under the majority doctrine a tribal member would receive, directly, his *per capita* share, *plus, indirectly,* the communal benefits to the tribe from the reserved 10 percent, while the alien to the tribe would not receive the latter. This inconsistency is but another of the idicia of the error in the majority's approach to the case.

While as partisan litigants the Delawares can take advantage of Appellee's failure to face the issue of justiciability, it is regrettable that this important issue is not realistically debated.

The doctrine of nonjusticiability was born of necessity under our system of separation of powers. When this Government was founded, Americans of European descent were in armed conflict with Americans of Indian descent along virtually the entire western frontier. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 39 (U.N.Mex. ed. 1942). Closing those wars with Indian nations was no more a function of the judiciary than the settlement of any other war. *See Commercial Trust Co. of New Jersey v. Miller,* 262 U.S. 51, 57 (1923); *United States v. Forty-three Gallons of Whiskey,* 93 U.S. (3 Otto) 188, 197 (1876); *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 242-43 (1872). The various recognitions and treaties were obviously political, not judicial, actions. *United States v. Sandoval,* 231 U.S. 28, 47 (1913); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 565 (1903).

These conditions prevailed, for more or less a century after the adoption of the Constitution, until 1871, when congressional enactments took the place of treaties. 25 U.S.C. § 71 (1970). Although outright armed hostilities were soon to cease, the essential nature of the problem of dealing with the various tribes or groups and exercising guardianship over them has not changed. *See Morton v. Mancari,* 417 U.S. 535, 551-53 (1974). As Justice Jackson observed in *Northwestern Bands of Shoshone Indians v. United States,* 324 U.S. 335, 355 (1940) (concurring opinion), the problem remains "essentially a sociological problem, not a legal one."

The Executive and Legislative branches of the Government have dealt with the problem in varying and inconsistent ways in their endeavor to find a solution acceptable to all Americans regardless of ethnic descent. We have gone through the periods of warfare, treaties, removal and allotment, reservations, removal of stewardship and reservation status, cooperative ventures, and the end is not yet in sight. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 46-88 (U.N.Mex. ed. 1942). These various and shifting policies were adopted by public servants just as conscientious and thoughtful as the judiciary and undoubtedly better equipped in the problems than most federal judges. *See United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419 (1865). Yet the Government has been unable to follow a consistent course.

If the matter had been subjected to judicial supervision, with the supposed certainty and consistency that should follow therefrom, the various shifts, turns, and experimentations that have produced a bettered but still trouble-ridden situation would have been impossible, or at least cumbered by delay and bitterness. Thus the doctrine of nonjusticiability as applied to Indian treaties and treaty rectification represents sound governmental and constitutional doctrine. The judiciary is not equipped to handle the situation and should recognize the desirability of not interfering with the political branches of the Government even though in any particular case it believes those branches may have acted unwisely. *United States v. First National Bank,* 234 U.S. 245, 260 (1914); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 568 (1903).

The majority below treated this case as simply one of making an "equitable distribution" following an award

of what sum was due. J.S. App. 25a. However, deeper considerations are involved—obviously Congress should consider, and did here, what, in this particular situation, would have a future therapeutic effect for the tribes and their members. See Brief for The Delaware Tribal Business Committee, *et al.,* at 37-38. Thus the doctrine of nonjusticiability is not mere legal dogma—it is founded on governmental realities. *See Gilligan v. Morgan,* 413 U.S. 1, 10-11 (1973).

What Appellee endeavors in her brief is substantially to advance the theories submitted in her Jurisdictional Statement in Case No. 75-1328, in which jurisdiction has not been noted.

While we shall not argue an appeal not before the Court, nevertheless, it may be noted that the gist of Appellee's position there, now transferred to these appeals, was that the Delaware Tribe "dissolved," in some unstated way, when its members, after giving consideration, went to live among the Cherokees in the ethnically confused situation then prevailing in the Indian Territory.

The theory espoused by Appellee is not the theory of the District Court, which expressly held that the Delawares constantly "maintained group identity." J.S. App. 11a and 11a n. 12. Appellee would erect her legal theory upon assumed (and unfound and incorrect) facts to the general effect that the Delaware Tribe was non-existent from 1867 until about 1974. That is scarcely permissible on appeal. Therefore, it seems clear that the truly opposing views with which the Court will be concerned in deciding these appeals are those of the majority below on the one hand and of the dissent and Appellants' briefs on the other.

Appellee concedes that the Delaware Tribe is a federally recognized tribe, although she erroneously claims the recognition came after this litigation had been started. Brief for Appellee, at 36. Recognition by the Commissioner of the Bureau of Indian Affairs was made May 31, 1962. Joint App., at 106. She would avoid this recognition on the ground that it was extended "arbitrarily," citing *United States v. State Tax Commission of Mississippi,* 505 F.2d 633 (5th Cir. 1974), *aff'd on rehearing,* 535 F.2d 300 (5th Cir. 1976). There the Fifth Circuit, as an alternative ground for a decision, would not recognize a federal administrative declaration of tribeship made to a disorganized group of citizens of some Indian descent (much like Appellee and the other so-called Kansas "Delawares") where the statute under which the administrative authorities purported to act authorized them to extend tribal recognition only to groups living on reservations. *Id.* at 642-43. No such abuse of congressionally delegated authority exists here. Here the continuous stream of tribal recognitions, including that in the statute under attack, repeatedly was congressional.

Further, as the court clarified on rehearing, the *Mississippi Tax Commission* decision was a narrow one, indeed. The court only considered whether "the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood" was impaired. 535 F.2d at 306. The court stated:

> As to the dealings between the Secretary of the Interior and the United States government, on the one hand, and the Mississippi Choctaws, on the other, we do not purport to pass on their validity *vis a vis* the participants.

Id.

The fact is this case remains simply one of citizens solely of the United States with some degree of Delaware descent challenging a congressional policy designed to benefit federally recognized Delaware tribes and their members and to exclude all others. Such challenge is foreclosed by this Court's decision in *Morton v. Mancari,* 417 U.S. 535 (1974).

Moreover, the 1854 Treaty, which was being enforced or vindicated by the Indian Claims Commission award, itself provides that the proceeds arising from the land sale should be applied, as Congress in its discretion may provide, "for the benefit of *the Delaware people.*" Treaty of May 6, 1854, arts. 7, 8, 10 Stat. 1048, 1050, J.S. App. 102a (emphasis added). Appellee and her ancestors have not been "Delaware people" since 1866, when her ancestors elected to become United States citizens and:

> . . . cease to be members of the Delaware tribe, and . . . not further participate in their councils, nor share in their properties or annuities.

Treaty of July 4, 1866, art. IX, 14 Stat. 793, 796, J.S. App. 113a-14a. Thus, by distributing the judgment fund to the two successor Delaware tribes and tribal members, that together comprise fully "the Delaware people," Congress simply and totally fulfilled its treaty obligations to the Delaware Nation, as it exists today. This distribution can be voided only by eschewing the 1854 and 1866 treaties, which the District Court did, but which is forbidden under the American scheme of constitutional government.

The history and traditions of the Tribe and the consistent, repeated recognition of the Tribe by a full range of the federal institutions responsible for Indian affairs entirely refute Appellee's contentions. The find-

ing of the Indian Claims Commission,[2] that of the Court of Claims,[3] the recitals of Congress in the distribution statutes,[4] the unanimous finding of the District Court that the "Cherokee Delawares" had steadily maintained group identity,[5] and 35 U.S. statutes, enacted from 1868, recognizing the Delaware Tribe for numerous purposes[6] render Appellee's assertion utterly groundless.[7]

---

[2] *Delaware Tribe of Indians v. United States,* 2 Ind. Cl. Comm'n 253, 260, 265 (1952); *see Absentee Delaware Tribe of Oklahoma v. United States,* 5 Ind. Cl. Comm'n 491-92 (1957).

[3] *Delaware Tribe of Indians v. United States,* 128 F. Supp. 391, 398 (Ct. Cl. 1955).

[4] 25 U.S.C. §§ 1291, 1292(c), 1294(b) (Supp. IV, 1974); 25 U.S.C. § 1182 (1970).

[5] J.S. App. 11a and 11a n.12.

[6] In these statutes, the Delaware Tribe of Indians has been recognized for the appropriation of funds, for grants of jurisdiction to pursue tribal claims in the Court of Claims, and for numerous other purposes. Perhaps the most relevant of these statutes are a 1904 act appropriating funds for the payment of $150,000 in settlement of pending tribal claims, including a claim based on the 1854 Treaty, to "*the Delaware tribe of Indians* residing in the Cherokee Nation, as *said tribe* shall in council direct . . . ," Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222 (emphasis added), and a 1925 act establishing Court of Claims jurisdiction over claims of "*the Delaware tribe of Indians* residing in Oklahoma." Act of Feb. 7, 1925, ch. 148, 43 Stat. 812 (emphasis added).

Other statutes are listed in Appendix A hereto.

[7] The only support cited by Appellee for her claim that the Delaware Tribe of Indians is not an Indian tribe are the decisions of this Court in *Delaware Indians v. Cherokee Nation,* 193 U.S. 127 (1904), and *Cherokee Nation v. Journeycake,* 155 U.S. 196 (1894). Brief for Appellees, at 35. These decisions did not hold that the Delaware Tribe of Indians had dissolved. That issue was neither raised by the parties nor considered by the Court. These cases merely involved adjudication of the land rights of the Delawares *vis-a-vis* the Cherokees and concerned in no way the determination of either Delaware treaty rights against the United States or tribal existence.

The Delaware Tribe of Indians continues as an entity under the supervision and control of the Bureau of Indian Affairs. The Tribe, meeting in General Council, established Tribal Bylaws on September 7, 1958, *see* Joint App., at 101, which were approved by the Commissioner of the Bureau of Indian Affairs on May 31, 1962, Joint App., at 106. This General Council was supervised by Bureau of Indian Affairs personnel. Joint App., at 106. The By-laws were amended by the Delaware Tribal General Council in 1974, and subsequently were approved by the Bureau of Indian Affairs. Defendants' Exh. No. 26, Record Vol. XXIX. This acceptance of a tribal governing document constitutes federal recognition of the Delaware Tribe as an entity exercising powers of self-government. Moreover, following institution of the present litigation, the Secretary of the Interior certified that the Tribe organized a legal entity that adequately protects the interests of its members in receiving the funds, as required by 25 U. S. C. § 1294(b) (Supp. IV, 1974). J.S. App. 18a-19a n. 20.[8]

Only Congress can determine, by affirmative action, when the continuing and special relationship between

---

[8] Appellee seeks to convert the requirement that the Delaware Tribe organize a legal entity that, in the judgment of the Secretary of the Interior, would adequately protect the interests of the members into "an awareness by Congress that there was no legal entity known as the Delaware Tribe of Indians." Brief for Appellees, at 25. This is a classic *non-sequitur.* The requirement that there be a new "entity" with adequate safeguards for handling the very substantial sum that the Tribe would receive in no way shows that Congress was "aware" that there was no entity whatsoever. Congress well knew there was a Delaware Tribe of Indians, but apparently felt it did not have adequate financial safeguards. Appellee wholly misconstrues the purposes and limited legal effect of the *proviso* to the distribution statute.

the United States and the Delaware Nation shall cease. *Board of County Commissioners v. Seber,* 318 U.S. 705, 718 (1943); *United States v. Sandoval,* 231 U.S. 28, 46, 47 (1913). It never has done so. Thus the congressional judgments inherent in the distribution statute should not be disturbed. *Morton v. Mancari,* 417 U.S. 535, 555 (1974).

Congress has ample power to distribute the judgment funds to the recognized Absentee Delaware and Delaware Tribes, and their members, without extending participation to descendants of Indians whose tribal relations were severed more than a century ago. Such method of distributing Indian Claims Commission judgments has been sanctioned by the Court of Claims. *Cherokee Freedmen v. United States,* 195 Ct. Cl. 39, 51 (1971); *Red lake and Pembina Bands v. Turtle Mtn. Band of Chippewa Indians,* 355 F.2d 936, 944 (Ct. Cl. 1965).

Nevertheless, Appellee offers two arguments in opposition.

First, Appellee contends that the ancestors of the so-called Kansas "Delawares," who were members of the Delaware Tribe in 1854, had individual, vested property rights that cannot be divested constitutionally. This was unanimously rejected below. The law is clear—the U.S. Government has never dealt with individual Indians, only with tribes; individual Indians enjoy no rights under treaties. *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma,* 220 U.S. 481 (1911). The Delaware land sold in 1854, and the proceeds received in return, was tribal property, held communally, and no individual held a vested right therein.

United States v. Jim, 409 U.S. 80, 82 (1972); *Sizemore v. Brady,* 235 U.S. 441, 446, 449 (1914).

Second, Appellee admits only a portion of the record when she asserts that Congress was "assured" that persons who subsequently became known as the litigation class, "Kansas Delawares," would not be excluded from the distribution. On the contrary, the tribal attorney for the Delaware Tribe represented:

> Mr. Chairman, *we* do not think there are any such [people who will be excluded]. *We know the Bureau maintains there are.* J.S. App. 67 (emphasis added).

In short, Congress knew the matter was disputable. The fact that no group that was subsequently identified as the so-called "Kansas Delawares" was mentioned sprang from the fact that *there was no such group,* in contradistinction to the Munsee groups. Appellee and her ancestors long before had vanished into the general citizenry and no longer were regarded as Indians, much less Delaware Indians. True, the Munsee groups, which had maintained tribal characteristics for more than a century and a half, although living in Wisconsin and Canada,[9] were mentioned because in substantial part they had caused the delay in distribution of the award for the old 1818 wrong. But to say that the Munsees were considered and excluded by Congress is not to say that the congressional experts in Indian Affairs who framed this legislation entertained the illusion that during the long span between 1854 and 1906 there had been no expatriation whatsoever from the Tribe. It would be imputing to Congressmen who daily deal with Indian Affairs a high

[9] C. WESLAGER, THE DELAWARE INDIANS 15-25 (Rutgers U. 1972).

degree of naivete to say they reasonably believed that no Indians abandoned their tribe during a 52-year period, especially when it includes the reign of the Indian removal and Oklahoma allotment policies where there were incentives—good or bad—to force Indian assimilation into the dominant society.[10] Given the vicissitudes of federal intercourse with Indians in general and the Delawares in particular, the patterns of repeated migration and all the possible permutations of the tribal relationship, it becomes incredible to presume that Congress thought that by adopting a 1906 Delaware roll as the basis of eligibility it was effecting a perfectly comprehensive distribution to all descendants of the 1854 Delaware Nation.

Those who have been designated "Kansas Delawares" in this litigation are descendants of individuals who took their share of tribal assets, who took land in severalty, who chose no longer to live as Indian or Delaware people, and thereafter disappeared into the dominant society as citizens and freeholders no longer

[10] The Indian long has been held to possess an inherent right to expatriate himself from his tribe on his own initiative. *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14,891 (C.C. Neb. 1879). Moreover, numerous treaties and statutes were designed either expressly or impliedly to facilitate individual Indians' formal and informal dissolution of their tribal relations. *See e.g.*, Treaty of Feb. 27, 1867, 15 Stat. 531 (Potawatomi); Treaty of Feb. 23, 1867, 15 Stat. 513 (Ottawa, others); Treaty of June 28, 1862, 13 Stat. 623 (Kickapoo); Treaty of Nov. 15, 1861, 12 Stat. 1191 (Potawatomi); Treaty of June 19, 1858, 12 Stat. 1037 (Sioux); Treaty of Feb. 5, 1856, 11 Stat. 663 (Stockbridge and Munsee); Treaty of Dec. 29, 1835, 7 Stat. 478 (Cherokee); Treaty of Oct. 20, 1832, 7 Stat. 381 (Chickasaw); Treaty of Sep. 27, 1830, 7 Stat. 333 (Choctaw); Treaty of Sep. 5, 1820, 7 Stat. 210 (Choctaw); Treaty of Feb. 27, 1819, 7 Stat. 195 (Cherokee); Treaty of July 8, 1817, 7 Stat. 156 (Cherokee).

specially entrusted to or protected by the United States.[11] They became, and are, aliens to the Tribe.

Finally, we suggest that the bewildering array of contentions that Appellee advances as to the tribal existence of the Delawares emphasizes our position that the majority below intruded itself into a political and nonjusticiable matter. The existence or non-existence of tribes and their systems of tribal membership have always been recognized to be matters for determination by the political branches of the Government. "If by [the political branches] those Indians are recognized as a tribe, this Court must do the same." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). Whether the Court determines that Appellee's contentions must fail on that ground, or as we contend, on the ground that the majority attempted to reform a treaty, the result is the same, the matter should be treated as nonjusticiable. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

[11] Although this Court is not the place to try detailed geneological facts, Appellee Weeks makes references to Joseph A. Bartles, who served as Chairman of the Delaware Tribal Business Committee from 1924-1951. He was the son of Nannie Bartles, one of the adult Kansas "Delawares" who remained in Kansas in 1867. But Nannie did not remain there for long. She soon rejoined the tribe, and her son was born in Indian Territory. Whatever the facts may be as to this, the District Court did not see fit to make any findings on the question. (Footnote 6 of the District Court's opinion indicates that perhaps the Court did not even admit evidence on this question. J.S. App. 5a-6a n. 6.) This matter illustrates the rationale for the courts' traditional reluctance to consider questions of this nature, and counsel's assertions present merely a diversionary tactic.

CONCLUSION

We respectfully pray that this Court reverse the judgment below and remand the case to the District Court with directions to dismiss the cases.

Respectfully submitted,

GEORGE B. CHRISTENSEN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

JOSEPH FONTANA
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

BRUCE MILLER TOWNSEND
201 Denver Building
7th & Denver
Tulsa, Oklahoma 74119

Counsel for Appellants

Of Counsel:

WINSTON & STRAWN
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Suite 5000
One First National Plaza
Chicago, Illinois 60603

APPENDIX

APPENDIX A

Statutes Recognizing the Existence of the Delaware Tribe Since 1867

1. Act of July 27, 1868, ch. 248, 15 Stat. 198, 207.
2. Act of April 10, 1869, ch. 16, 16 Stat. 13, 22.
3. Act of July 15, 1870, ch. 296, 16 Stat. 335, 342.
4. Act of March 3, 1871, ch. 120, 16 Stat. 544, 552.
5. Act of May 29, 1872, ch. 233, 17 Stat. 165, 172.
6. Act of February 14, 1873, ch. 138, 17 Stat. 437, 446.
7. Act of June 22, 1874, ch. 389, 18 Stat. 146, 155.
8. Act of March 3, 1875, ch. 132, 18 Stat. 420, 430.
9. Act of August 15, 1876, ch. 289, 19 Stat. 176, 199.
10. Act of March 3, 1877, ch. 101, 19 Stat. 271, 293.
11. Act of May 27, 1878, ch. 142, § 2, 20 Stat. 63, 86.
12. Act of February 17, 1879, ch. 87, § 2, 20 Stat. 295, 315.
13. Act of May 11, 1880, ch. 85, § 2, 21 Stat. 114, 132.
14. Act of March 3, 1881, ch. 137, § 2, 21 Stat. 485, 501.
15. Act of May 17, 1882, ch. 163, § 2, 22 Stat. 68, 87.
16. Act of March 1, 1883, ch. 61, § 2, 22 Stat. 433, 450.
17. Act of July 4, 1884, ch. 180, § 2, 23 Stat. 76, 96.
18. Act of March 3, 1885, ch. 341, § 2, 23 Stat. 362, 383.
19. Act of May 15, 1886, ch. 333, § 2, 24 Stat. 29, 46.
20. Act of March 2, 1887, ch. 320, § 2, 24 Stat. 449, 466.
21. Act of June 29, 1888, ch. 503, § 2, 25 Stat. 217, 237.
22. Act of October 19, 1888, ch. 1211, 25 Stat. 608, 609.
23. Act of August 19, 1890, ch. 807, § 2, 26 Stat. 336, 360.

24. Act of October 1, 1890, ch. 1249, 26 Stat. 636.

25. Act of March 3, 1891, ch. 543, 26 Stat. 989, 994.

26. Act of July 13, 1892, ch. 164, 27 Stat. 120, 125, 143 (§ 2).

27. Act of March 3, 1893, ch. 209, 27 Stat. 612, 617, 638 (§ 2), 641 (§ 10).

28. Act of August 15, 1894, ch. 290, 28 Stat. 286, 292.

29. Act of June 28, 1898, ch. 517, § 25, 30 Stat. 495, 504.

30. Act of March 1, 1901, ch. 675, § 14, 31 Stat. 848, 850.

31. Act of July 1, 1902, ch. 1375, § 23, 32 Stat. 716, 718.

32. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 205, 222 (§ 21).

33. Act of February 7, 1925, ch. 148, 43 Stat. 812.

34. Act of March 3, 1927, ch. 314, 44 Stat. 1358.

35. Act of June 4, 1936, ch. 491, 49 Stat. 1459.

see

75

1335

1495